No 80-496

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

JAMES C. BURNS; C. H. CARTER; LOUIS J. GIDDENS; DELBERT R. GRANDE; DAVID C. MILLIGAN; THOMAS M. POTTER; JAMES A. RIDDLE; W. R. TODD; JOSEPH O. TURNER, II; KENNETH E. MAGENHEIMER; JACK CLINE; and ROLAND L. LANCASTER,

Petitioners,

versus

GULF OIL CORPORATION,
a foreign corporation,

Respondent.

On Writ of Certiorari to
The United States Court of Appeals
For the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The Court of Appeals erred in concluding no merit to the Petitioners' claim for benefits or damages pursuant to their contractual relationship with the Respondent on account of the Respondent's wrongful discharge of the Petitioners.

The Court of Appeals erred in affirming final summary judgment entered by the District Court on Petitioners' claim for per se slander and intentional or reckless infliction of emotional distress upon the Petitioners by Respondent.

The Court of Appeals erred in its conclusion that the District Court's granting of a motion in limine without the giving of any prior notice of the motion or hearing and therefore, caught the Petitioners by surprise and materially prejudiced their right to fair trial with effective assistance of counsel.

That there is no substantive difference between a public or private employer's discharge of an at-will or non-tenured employee for slanderous reasons, or in violation of his constitutionally and/or statutorily protected rights. Both such employers are, and should be, responsible therefore.

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OPINIONS BELOW

The decision sought to be reviewed is entitled JAMES C. BURNS, et al v. GULF OIL CORPORATION, a foreign corporation, bearing appellate case no. 78-3263, appealed from the United States District Court from the Middle District of Florida. The decision is dated June 4, 1980 and made a part of the appendix at pages 1a through 3a submitted herewith, rehearing having been denied July 2, 1980, a copy of same is likewise made a part of the supporting appendix, page 4a.

JURISDICTION

The Petitioners contend that the Court of Appeals for the Fifth Circuit by affirming the summary judgment herein conflicts with decisions of other federal courts on the same or similar matter and has decided a federal question in a way in conflict with a state court of last resort and has otherwise so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. The instant decision facially conflicts with applicable decisions of this Court construing the equal-protection rights of United States citizens.

INVOLVED CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, AND REGULATIONS

Florida Statute 447.03

"Employees shall have the right to self-organization, to form, join, or assist labor unions or labor

organizations or to refrain from such activity, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection."

Florida Statute 447.17

"(1) Any person who may be denied employment or discriminated against in his employment on account of membership or nonmembership in any labor union or labor organization shall be entitled to recover from the discriminating employer, other person, firm, corporation, labor union, labor organization, or association, acting separately or in concert, in the courts of this state, such damages as he may have sustained and the costs of suit, including reasonable attorney's fees. If such employer, other person, firm, corporation, labor union, labor organization, or association acted willfully and with malice or reckless indifference to the rights of others, punitive damages may be assessed against such employer, other person, firm, corporation, labor union, labor organization or association.

(2) Any person sustaining injury as a result of any violation or threatened violation of the provisions of this section shall be entitled to injunctive relief against any and all violators or persons threatening violation.

(3) The remedy and relief provided for by this section shall not be available to public employees as defined in part II of this chapter."

Art. I, §6, *Florida Constitution*, (1968)

"The right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union or labor organization. The right of employees, by and through a labor organization, to bargain collectively shall not have the right to strike."

Amendment V, *United States Constitution*

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Amendment XIV, §1, *United States Constitution*

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction

thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Federal Rules of Civil Procedure, Rule 6(d)

"(d) For Motions-Affidavits. A written motion, other than one which may be heard ex parte, and notice of the hearing thereof shall be served not later than 5 days before the time specified for the hearing, unless a different period is fixed by these rules or by order of the court. Such an order may for cause shown be made on ex parte application. When a motion is supported by affidavit, the affidavit shall be served with the motion; and, except as otherwise provided in Rule 59(c), opposing affidavits may be served not later than 1 day before the hearing, unless the court permits them to be served at some other time."

Federal Rules of Civil Procedure, Rule 7(b)

"(b) Motions and Other Papers.

(1) An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with

particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.

(2) The rules applicable to captions, signing, and other matters of form of pleadings apply to all motions and other papers provided for by these rules."

42 USCS §1983

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

42 USCS §1985

"(1) Preventing officer from performing duty. If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district or place, where his duties as an officer are required to be perform-

ed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties;

(2) Obstructing justice; intimidating party, witness, or juror. If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

(3) Depriving persons of rights or privileges. If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice-President, or as a member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators."

Florida Evidence, Rules 82 and 83

"Rule 82. Relevancy — Definition

Evidence is relevant if it has any tendency in reason to prove any material fact in issue."

"Rule 83. Relevancy Distinguished From Admissibility and Materiality

To be admissible, evidence must be both relevant and material; but even though relevant and material, evidence may not be admissible if it is barred by some rule of expediency, public policy, or procedure."

Federal Rules of Evidence, Rules 401 and 402

"Rule 401. Definition of 'Relevant Evidence'

'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

"Rule 402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible."

STATEMENT OF THE CASE

This was a diversity of citizenship case under Title 28 of the United States Code, §1332.

The twelve Petitioners, all residents of Florida, filed their Complaint on September 24, 1975 alleging in Count I that they have been wrongfully discharged by the Respondent herein and that they had been deprived of their property interest in their job without due process of law. In Count II, the Petitioners herein alleged that they had been slandered by (employees of) the Respondent. Respondent, at the time the Complaint was filed in the District Court, was a foreign corporation doing business in the State of Florida and the amount in controversy exceeded $10,000.00.

On December 31, 1975, the District Court granted the Respondent's Motion to Dismiss for failure to sufficiently allege jurisdiction without prejudice to the filing of an Amended Complaint within twenty days. Thereafter, on January 14, 1976, the Petitioners herein filed an Amended Complaint. That Count I of the Amended Complaint alleged that the Respondent had intentionally breached employment agreement and that said breach of employment agreement was for false, arbitrary and discriminatory or mercenary reasons. In Count II of that Complaint, the Petitioners alleged that they had been slandered by employees of Gulf Oil Corporation and that the conduct and actions of the Respondent herein constituted the tort of out-

rage of the intentional or reckless infliction of mental and emotional distress. Count III of the Complaint alleged a conspiracy to deprive the Petitioners of equal protection, and the privileges of immunities of law, Title 42, §1983 and §1985 of the United States Code.

Thereupon, Respondent filed a Motion to Dismiss the Amended Complaint. Thereafter, on April 4, 1976, the District Court entered an Order on a Motion to Dismiss the Amended Complaint dismissing Count I of the Amended Complaint with leave to amend within twenty days. Said Order deferred the Respondent's response to Count II of the Amended Complaint until the filing of the Second Amended Complaint.

Thereafter, on April 15, 1976, the Petitioners herein filed their Second Amended Complaint wherein in Count I they again alleged the breach of the employment agreement and intentional breach of the employment agreement for false, arbitrary and discriminatory or mercenary reasons and realleged their allegations in Count II with respect to slander and the "tort of outrage."

On May 5, 1976, the Respondent herein filed its Motion to Dismiss Count I of the Second Amended Complaint. On June 16, 1976, the District Court entered an Order Denying the Respondent's Motion to Dismiss Count I of the Second Amended Complaint and directing the Respondent to respond within twenty

days. On July 8, 1976, the Respondent filed its Answer to the Second Amended Complaint. Thereafter, on February 25, 1977, the Respondent filed its Motion for Summary Judgment on Count I of the Complaint and on March 23, 1977, the Respondent filed its Motion for Summary Judgment as to Count II of the Second Amended Complaint. On March 31, 1977, the District Court entered an Order granting the Respondent's Motion for Summary Judgment as to Count I and denying Respondent's Motion for Summary Judgment or Partial Summary Judgment for Count II. Petitioners were directed to file within five days of the date of the Order a memorandum in support of their claim under the theory of the "tort of outrage."

Thereafter on December 6, 1977, the District Court entered an Order directing the Petitioners to file an Amended Complaint setting forth separate counts as to slander and the tort of outrage. In the same Order, the Respondent's Motion for Summary Judgment was denied.

On December 14, 1977 and pursuant to the directive of the District Court, the Petitioners filed their Third Amended Complaint wherein in Count I they alleged that the manner, method and motives of the Respondent in the discharge of the Petitioners herein constituted a deliberate or reckless infliction of emotional distress ("tort of outrage"). In Count II, the Petitioners alleged slander and the tort of outrage. There-

after, on December 30, 1977, the Respondent filed its Answer to Count II of the Complaint, Motion to Dismiss Count I of the Third Amended Complaint and Motion to Strike or in the alternative, Motion to Dismiss Portions of Count III of the Third Amended Complaint.

On January 18, 1978, the District Court entered an Order dismissing Count I of the Third Amended Complaint and directing the Petitioners to file an Amended Complaint within ten days on the two remaining causes of action, to-wit: slander and the "tort of outrage". Thereafter, on January 24, 1978, the Petitioners herein filed a Fourth Amended Complaint wherein they alleged in Count I the tort of outrage and in Count II, the action for slander. Thereafter, on February 8, 1978, the District Court entered an Order directing Petitioners to file another Amended Complaint within two days and directing the Respondent to respond within two days of the filing of the Amended Complaint. The Respondent's Motion for Summary Judgment regarding slander claim was denied for *the second time.* Petitioners, on February 9, 1978, filed their Fifth Amended Complaint wherein in Count I they alleged the "tort of outrage" and in Count II, they alleged the tort of slander. Respondent, on February 13, 1978, filed a Motion to Dismiss Count I of the Amended Complaint and on February 21, 1978, filed an Answer to Count II of the Fifth Amended Complaint. In response, the Petitioners on February 27, 1978, filed a

Motion for Entry of Default Judgment against the Respondent as to Count I of Petitioners' Fifth Amended Complaint for failure to comply with the Court's order to answer within two days as aforesaid. On June 7, 1978, the District Court entered an Order denying Respondent's Motion to Dismiss and the Petitioners' Motion for Default Judgment. Thereafter, on June 16, 1978, the Respondent herein filed its Answer to Count I of the Fifth Amended Complaint.

On the day of the trial, July 17, 1978, the Respondent herein filed a Motion in Limine wherein it sought to limit testimony and evidence to be presented at the trial by the Petitioners. That the Court granted said Motion in Limine on July 17, 1978.

Thereafter on August 25, 1978, the District Court entered Final Summary Judgment in favor of the Respondent and on August 29, 1978, granted Final Judgment that the Petitioners take nothing and that the cause be dismissed on the merits.

September 5, 1978, Petitioners filed their Motion for Rehearing and/or New Trial which was denied on September 29, 1978, and thereafter duly prosecuted their appeal to the Fifth Circuit Court of Appeals.

All of these Petitioners were employees of the Respondent, having worked for the Respondent a number of years ranging from six to over twenty years,

and all of them had good or higher work performance records with the Respondent up to the time of their discharge in June 1975.

That shortly prior to the Petitioners being individually informed of their discharge, Petitioners were individually called into one of Respondent's offices at the Port Tampa Terminal and there subjected to improper and unlawful interrogation during which representations on behalf of the Respondent, through its private investigators, were made to the Petitioners that the information furnished by the individual Petitioners would not even be placed in their file jackets. The investigators, on behalf of the Respondent, advised the Petitioners they were only interested in those individuals taking large quantities of gas for purposes of resale and not for taking small quantities for personal use, which was a long standing practice or custom engaged in by all employees including those at the management level.

That said private investigators, who were employees of the Respondent, never informed the Petitioners of their constitutional rights against self-incrimination, right of counsel, nor of the fact that they need not talk or discuss this matter at all, nor did the private investigators ever inform any of these Petitioners that they might or could lose their jobs as a consequence of having talked with said investigators.

That as a consequence of the foregoing, some of the Petitioners did give incriminating statements to said investigators and in said statements, identified others whom they had seen taking gasoline for their own personal use, some of whom are employees of the Respondent. Some of those Petitioners who were so identified, in fact, refused to give any statements to said investigators, but nevertheless and notwithstanding, were discharged for allegedly stealing company property.

As a result of the investigation, the Petitioners were discharged for cause while others who had committed like or similar acts, were retained.

When these Petitioners attempted to seek unemployment compensation from the Florida Unemployment Compensation Department, the Respondent appeared before said state agency and there reaffirmed and reasserted the false accusations for the purpose of depriving the Petitioners and their dependents of the compensation they would have otherwise been entitled to under Florida law.

That thereafter, at a meeting of truckdrivers still in the employ of the Respondent, management level representatives of the Respondent again repeated the false accusation of alleged theft as the cause of Petitioners' discharge.

Petitioners contend in the instant case that said asserted cause of discharge by the Respondent was false and that the real purpose sought to be accomplished by the Respondent was the discontinuation of the transporting of its own products and chose these Petitioners because they were active in attempting to organize the truckdrivers. That the Respondent employed oppressive and unlawful tactics in setting about to obtain the discharge of these Petitioners based upon the admissions unlawfully extracted as hereinabove mentioned, and in the process, violated Respondent's own expressed policy standards for the disciplining of its employees which said standards require equal and consistent treatment for all offending employees.

By virtue of the Petitioners' discharge as hereinabove mentioned, Petitioners were substantially denied their retirement benefits, pension and profit sharing plan benefits, severance pay, accrued vacation pay and the balance of their wages to the end of the next pay period which they would have otherwise been entitled to.

Petitioners additionally asserted that they were slandered by the false accusations and sustained as a result, extreme mental anguish and their ability to earn a livelihood was severely impaired and irreparable damages sustained to their reputations.

ARGUMENT

These Petitioners contend that they have been deprived of their Fifth and Fourteenth Amendment rights to the United States Constitution, Art. I, §6 rights contained in the 1968 Fla. Const. and equal-treatment rights guaranteed all citizens under the Civil Rights Act, Title 42, §§1983 and 1985, U.S.C., and their rights and remedies provided under §447.03 and §447.17, Fla. Stat. and those judicial decisions recognizing the existence of claims for per se slander and "tort of outrage" or reckless infliction of extreme mental anguish.

Capsulizing Petitioners' argument, the record will reflect that there was a long standing practice or custom for many years for employees including management-level employees, to take and use small quantities of company products when needed. That immediately prior to their discharge in June 1975, all of these Petitioners had good work performance records recorded by their superiors in their employee personnel files kept by the employer, but nevertheless, after individual interrogation by the special investigators who were also employees of Respondent, in which Petitioners were never informed of their constitutional and job rights, Petitioners were discharged for allegedly stealing company products. There was no evidence of such except the wrongfully obtained admissions of some, not all, and identification of those non-confess-

ing by those that made said identifications in their confessions.

Some of the current employees at the terminal were interrogated, made no admissions but were likewise identified as having taken and used company products in the same manner as Petitioners. The Petitioners contended that the Respondent violated its own expressed policy standards and rules for the disciplining of its own employees which mandated the treating of employees the same under the same circumstances and enjoined inconsistent treatment when deciding on appropriate disciplinary action and also provided a counselling or hearing mechanism. That these twelve Petitioners were active in attempting to organize the truckdrivers and the record reveals Respondent's interference with their state protected, statutory rights and remedies designed to protect them in their state right to organize. That when these Petitioners were terminated, some were denied their severance pay and other accrued benefits and all were denied their unemployment compensation afforded them under the state law on account of said false termination charges deliberately and wrongfully communicated by the Respondent to the state agency.

Approximately one and a half months after termination during the month of August 1975, at one of the Respondent's truckdrivers' meetings, the remaining drivers were told that the Petitioners were terminated for stealing company products.

As a consequence of the foregoing, Petitioners filed their complaint in the District Court based upon diversity of citizenship asserting among other things, wrongful discharge from employment arising out of a breach of the employment contract they held with the Respondent, per se slander, the tort of outrage or reckless infliction of mental anguish and initially, violation of Title 42, §§1983 and 1985, U.S.C., Civil Rights Act. This civil rights claim was earlier dismissed with prejudice on motion.

Petitioners were required to amend their complaint five times and after several motions to dismiss were finally denied including *motion for summary judgment* on the slander (twice) and tort of outrage counts, the case was set for jury trial.

The morning of the jury trial and in violation of the Federal Rules of Civil Procedure, Rules 6(d) and 7(b) — pertaining to service of motions, notices of hearing and requiring all pre-trial motions to be in writing, Respondent filed, and the District Judge granted, motion in limine severely limiting the scope of Petitioners' proof at trial.

Petitioners, in support of their "tort of outrage" claim, had alleged that one of the real reasons for the pretextual discharge was the fact that they were active in trying to organize the drivers at the terminal and that the Respondent violated Florida Statutes, §447.03

and §447.17 which prohibits attempting to coerce and intimidate employees in their decision to organize themselves and providing a civil damage remedy therefore. During the chamber hearing, when it became apparent that Petitioners were not going to be allowed to present all relevant evidence on their pending claims contrary to the Rules of Evidence, Florida and Federal, (*Williams v. State*, 110 So.2d 654 [Fla. App.]; Fla. Evid., Rules 82 & 83 and Rules 401 & 402 of the Fed. Rules of Evid.) — as a matter of fact *the* material evidence, but rather would be limited to the proof of discharge and the cause therefore and whether the asserted cause was true or not, without being allowed to develop the longstanding custom or practice permitting employee-use of company property, it was then apparent that Petitioners would not receive the fair trial and due process of law guaranteed to them under the Fifth and Fourteenth Amendments to the United States Constitution, particularly after the District Judge characterized Petitioners' case as a simple chicken-stealing case and inferring it wasn't worthy of a federal jury's time. Petitioners unsuccessfully sought recusal on account of said comments.

Final summary judgment was entered dismissing Petitioners' claims for per se slander and "outrage."

Petitioners prosecuted their appeal to the Court of Appeals, Fifth Circuit, contending that the District Court erred in dismissing their claims for wrongful dis-

charge on account of Respondent's breach of employment contract and their claim of conspiracy to violate their civil rights, that the court erred in entering final summary judgments on the per se slander and "outrage" claims and in granting Respondent's motion in limine.

The Court for the Fifth Circuit Court of Appeals affirmed the District Judge rendering a per curiam decision declaring there was no merit to the contract claim and suggesting that a claim should have been filed before the National Labor Relations Board if Petitioners wished to advance a labor-related claim, contrary to the decision contained in the case of *Mobley v. Southern Plasma Corp.*, 366 So.2d 480 (Fla. App. 1979). As to the slander and outrage claims, the Circuit Court found that Petitioners were not "surprised" by the motion in limine and that there was no prejudice to Petitioners in the granting of the in limine motion.

Petitioners suggest a violation of their state and federal constitutional, equal-protection rights as United States citizens in common with all who work for another in an effort to secure their inherent, constitutional right to earn a livelihood.

More specifically, Petitioners contend the instant decision also conflicts with that portion of this Court's decision in *McDonald v. Sante Fe Trail Transportation Company*, 427 U.S. 273, 49 L.Ed.2d 493, which recognized the lia-

bility of a *private employer* for unequal treatment in the discharging of some employees and the retention of others when all were charged with the same offense of mis-appropriating company property. In that case, the Court noted at page 2582 of its opinion that the terms of §1981 (Title 42, U.S.C., Civil Rights Act) applies to " 'all persons' including white persons - - -" and that the Act was intended to protect all persons in the United States in their civil rights when initially introduced in Congress.

The instant decision also conflicts with the following cases in that they each recognize the responsibility of (a public) employer for terminating an (non-tenured or at-will) employee for a false and slanderous reason without the hearing required by rule or statute. While these cases following involved a "public" employer that had undertaken to provide disciplinary-type hearings prior to discharge, Petitioners respectfully submit there is no substantive difference whether the status of the employer be "public or private" insofar as the protection of an employee's fundamental rights are concerned, whenever it appears the employer assumes to act with care by the promulgation of company rules providing a procedure for disciplining of employee.

In *Allison v. City of Live Oak,* 450 F.Supp. 200 (DCMD of Fla. 1978), it is noted:

> "Although reputation standing alone is not a constitutionally protected interest, when coupled with the loss of employment, it will invoke due process safeguards — a property interest is recognized when a 'legitimate claim of entitlement' is established."

To like effect, please see the Florida case *Drennen v. Westinghouse Electric Corporation*, 328 So.2d 52 (Fla. App. 1976).

The Petitioners contended before the Fifth Circuit Court of Appeals that the Respondent had voluntarily assumed a duty of care of obligation toward its employees which invested the at-will employment with a protectable property interest. In this regard, *Fidelity & Cas. Co. of N.Y. v. L.F.E. Corp.*, 382 So.2d 363 (2d DCA, Fla. 1980) is a Florida case that stands for the proposition that:

> "In every situation where a man undertakes to act, or to pursue a particular course, he is under an implied legal obligation or duty to act with reasonable care. - - -" (p 367)

To analogous effect are the decisions of *Allison v. City of Live Oak, supra,* and *Blevins v. Kreutzman*, 446 F.Supp. 1107 (DCED Wisc. 1978).

In *Owen v. City of Independence, MO.*, 100 S.Ct. 1398 (1980) the Court vindicated denial of procedural and substantive due process rights where it appeared that

the police officer alleged he was discharged without notice of reasons and without a hearing in violation of his constitutional rights to procedural and substantive due process, and as aptly noted by the Court at page 1415 of its opinion:

> "- - - A damage remedy against the offending party is a vital component of any scheme for vindicating, cherished constitutional guarantees, - - -"

and in the recent case of *Whirlpool Corp. v. Marshall*, 100 S.Ct. 883, the Court cogently observed at page 894,

> "- - - An employer 'discriminates' against an employee only when he treats that employee less favorably than he treats others similarly situated,"

and as we have seen in *McDonald, supra.*, private employers may likewise be held accountable in damages for denial or abridgment of basic constitutional rights.

Measuring the record in the instant case by these foregoing pronouncements, it would appear that these Petitioners have been "discriminated" against by the unequal treatment received at the hands of their employer in that others are retained who have committed the same act. That if indeed there was a long standing practice or custom of employee-use of com-

pany products, and the Petitioners acted in accordance with same, they would not have any felonious intent and could not have been guilty of stealing. *Mariner Charters, Inc. v. Foremost Insurance Company,* 316 So.2d 602 (Fla. App. 1975).

The District Judge initially denied summary judgment motion on Petitioners' claim for per se slander and had denied Respondent's motion to dismiss the outrage claim. The Petitioners had attempted to set up the wrongful discharge from employment, the per se slander, and had alleged that these Petitioners had attempted to organize the truckdrivers with a resulting unlawful interference by the employer, all in support of their "outrage claim." In connection herewith, the Petitioners alleged that this wrongful conduct was such as to naturally cause and did cause them and their families to be held up to scorn and ridicule in the community, suffered substantial impairment in their earning capacities and suffered such extreme mental anguish as to cause physical illness.

Florida has recognized the tort of intentional or reckless infliction of extreme mental anguish as evidenced by the following authorities and decisions: 32 Fla. Jur., *Torts,* §15-Interference with Emotional Tranquility, p. 143; *Deland v. Florida Transp. & Leasing Corp.,* 293 So.2d 800, (Fla. App. 1974); *World Ins. Co. v. Wright,* 308 So.2d 612 (Fla. App. 1975); and *Fletcher v. Florida Publishing Co.,* 319 So.2d 100 (1975).

CONCLUSION

It is respectfully suggested that the Petitioners herein have been denied their Fifth and Fourteenth Amendment-Civil Rights as implemented through Title 42, U.S.C. including their procedural and substantive due process rights, for which it is respectfully prayed that this Honorable Court will take jurisdiction of this cause and enter order quashing the decision of the Fifth Circuit Court of Appeals and reinstating this cause for trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the foregoing have been furnished by U.S. Mail this ____ day of September, 1980 to Benjamin H. Hill, III, Esquire and Charles P. Schropp, Esquire of Shackleford, Farrior, Stallings & Evans, P.A., P.O. Box 3324, Tampa, Florida, 33601, Attorneys for Respondent.

I further certify that all parties required to be served have been served.

_____

BRITT WHITAKER

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 78-3263

JAMES C. BURNS, ET AL.,
Plaintiffs,

versus

GULF OIL CORPORATION,
Defendant.

Appeal from the United States District Court for the Middle District of Florida

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(JUNE 4, 1980)

Before RUBIN and POLITZ, Circuit Judges and POINTER*, District Judge.

PER CURIAM:

Gulf Oil Corporation discharged twelve of its truck drivers who took gasoline for their personal use without paying for it. The plaintiffs argued that Gulf

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* District Judge of the Northern District of Alabama sitting by designation.

breached an employment agreement and also sought recovery of damages for slander and intentional infliction of emotional distress. After much skirmishing and amending of pleadings, the trial judge granted summary judgment for the defendant on all claims.

I

There is no merit to the contract claim. The employment contracts were for an indefinite term and were terminable at will by either party. Thus, under Florida law Gulf had the right to fire the employees for any reason or even for no reason. *See* Harrison v. Jack Eckerd Corporation, 342 F.Supp. 348 (M.D. Fla.), *aff'd*, 468 F.2d 951 (5th Cir. 1972). However, Gulf clearly had good cause — theft of company property, a major offense under the company rules. The plaintiffs' participation in employee benefit plans, such as retirement program and stock option plan, did not change the contract terms or give them a vested property interest in their jobs. *Id.*

The plaintiffs tangentially toss in a suggestion that they were fired to deter union organization. If the plaintiffs had wished to advance a labor-related claim, they should first have filed the claim with the National Labor Relations Board. *See* San Diego Building Trades Council v. Garmon, 359 U.S. 236, 79 S.Ct. 773, ____ L.Ed.2d ____ (1959).

II

The plaintiffs also alleged slander and intentional infliction of emotional stress by the defendant. On the day of the trial, Gulf filed a motion in limine to confine the introduction of evidence to these allegations. The judge granted the motion. The plaintiffs argue that the motion caught them by surprise. We find it unnecessary to consider the plaintiffs' argument that they were entitled to notice of the motion. See Fed.R.Civ.P. 6(d). Aside from the fact that the plaintiffs did not object to the lack of notice at the time the motion was made, the court had ruled previously that only evidence relevant to the alleged torts would be admitted. Thus the plaintiffs had actual notice and there was no prejudice. *See* Herron v. Herron, 255 F.2d 589, 593 (5th Cir. 1958).

The plaintiffs also claimed, in a motion for rehearing, that the trial judge should have recused himself. The motion did not meet the requirements of 28 U.S.C. §144 in form or substance. Moreover, there is no basis in the record for it save dissatisfaction with the trial judge's rulings. The judge's remarks, even taken out of context, do not exhibit prejudice. Indeed, the trial judge was exceedingly patient in permitting repeated amended complaints and in giving the plaintiffs' counsel an opportunity to attempt to demonstrate a basis for the action.

For these reasons, the judgment is AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

(Number and Title Omitted)

Appeal from the United States District Court for the Middle District of Florida

ON PETITION FOR REHEARING

(July 2, 1980)

Before RUBIN and POLITZ, Circuit Judges and POINTER*, District Judge.

PER CURIAM.

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

_____

United States Circuit Judge

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* District Judge of the Northern District of Alabama sitting by designation.

Supreme Court, U. S.
FILED
DEC 31 1980
MICHAEL RODAK, JR., CLERK

No. 80-496

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

JAMES C. BURNS; C. H. CARTER; LOUIS J. GIDDENS; DELBERT R. GRANDE; DAVID C. MILLIGAN; THOMAS M. POTTER; JAMES A. RIDDLE; W. R. TODD; JOSEPH O. TURNER, II; KENNETH E. MAGENHEIMER, JACK CLINE; and ROLAND L. LANCASTER,
Plaintiffs-Appellants,

versus

GULF OIL CORPORATION, a foreign corporation,
Defendant-Appellee.

On Writ of Certiorari to
The United States Court of Appeals
For the Fifth Circuit

SUPPLEMENTAL BRIEF

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Margolin v. Plant Hospital Association, Inc., 348 So.2d 57 (Fla. 2d DCA) 2

No. 80-496

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

JAMES C. BURNS; C. H. CARTER; LOUIS J. GIDDENS; DELBERT R. GRANDE; DAVID C. MILLIGAN; THOMAS M. POTTER; JAMES A. RIDDLE; W. R. TODD; JOSEPH O. TURNER, II; KENNETH E. MAGENHEIMER; JACK CLINE; and ROLAND L. LANCASTER,
Plaintiffs-Appellants,

versus

GULF OIL CORPORATION,
a foreign corporation,
Defendant-Appellee.

On Writ of Certiorari to
The United States Court of Appeals
For the Fifth Circuit

SUPPLEMENTAL BRIEF

COMES NOW the Plaintiffs-Appellants, by and through their undersigned counsel, and file this their

Supplemental Brief pursuant to Rule 22.6 of the Rules of the Supreme Court of the United States, adopted April 14, 1980, effective June 30, 1980, and wishes to call the Court's attention to the following Florida decisions, two of which are recently decided, and one of which was otherwise unavailable or overlooked at the time of the filing of the Petition herein. The recent Florida decisions are: Margolin v. Plant Hospital Association, Inc., 348 So.2d 57 (Fla. 2d DCA). This case stands for the proposition that a claim exists for violation or deviation from a corporation or company's by-laws relating to disciplinary proceedings of its own employees as this decision has a direct bearing upon one of the issues raised in the instant Petition. Another recent decision directly in point upon one of the key issues raised in this case, to-wit: violation of Gulf's disciplinary rules and policy, involves an award of damages as a consequence of a hospital's failure to comply with its own by-laws pertaining to disciplinary hearings for its staff members, Dam v. Heart of Florida Hospital, Inc., Cir.Ct., Polk County, Number GCG-79-1533. Defendant in this case, we are informed by Plaintiff's counsel, filed a Notice of Appeal and later abandoned same. Attached hereto is a reproduction of the Complaint and Final Judgment.

Plaintiffs-Appellants would also call the Court's attention to the case of Drennen v. Westinghouse Electric Corporation, 328 So.2d 52 (Fla. 1st DCA), in which that Court held actionable, under the theory of slander,

the employer's publication to several other employees that Plaintiff had been discharged for taking company property and that the defense of truth and good motives are matters normally to be resolved by a jury.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the foregoing have been furnished by United States Mail this ____ day of December, 1980 to Benjamin H. Hill, III, Esquire, and Charles P. Schropp, Esquire, of Shackleford, Farrior, Stallings & Evans, P.A., Post Office Box 3324, Tampa, Florida 33601, Attorneys for Respondent-Appellee.

I further certify that all parties required to be served have been served.

BRITTAIN WHITAKER

APPENDIX

IN THE CIRCUIT COURT OF THE
TENTH JUDICIAL CIRCUIT
IN AND FOR POLK COUNTY, FLORIDA

MICHAEL E. DAM, JR., M.D.,
Plaintiff,
Case No.
versus GCG-79-1533

HEART OF FLORIDA HOSPITAL
ASSOCIATION, INC.,
a non-profit Florida corporation,
Defendant.

AMENDED COMPLAINT

COMES NOW the Plaintiff, MICHAEL E. DAM, JR., M.D., hereinafter called DR. DAM, and sues the Defendant, HEART OF FLORIDA HOSPITAL ASSOCIATION, INC., a non-profit Florida corporation, and alleges:

1. This is an action for damages in excess of One Hundred Thousand ($100,000.00) Dollars.

2. DR. DAM is a medical doctor who at all times material to this cause of action practiced medicine in Haines City, Florida and was a member in good standing of the staff of the Defendant Hospital and enjoyed

all privileges attendant to that status as a member of the Defendant Hospital.

3. The Defendant Hospital is a non-profit corporation organized to do business under the laws of the State of Florida whose principal place of business is Haines City, Florida. Its resident agent is David E. Kribs, 368 Peninsula Court, Haines City, Florida.

4. On July 28, 1977, and at all times material to this cause of action, the following people were agents of the Defendant Hospital, in the following capacity:

(a) Dale F. Syfert, member of the staff, member of the Clinical Review Committee, member of the Executive Committee.

(b) Dr. Robert E. Lee, President, Medical Staff, Chairman, Executive Committee.

(c) Dr. Edward F. Jukes, member of the staff, Chairman of the Clinical Review Committee.

(d) Dr. Frank J. Thornton, member of the staff, member of the Executive Committee.

5. On June 28, 1977, the Defendant Hospital, acting through its Clinical Review Committee, met and reviewed charts #20184 and #20184NB, which were records of two patients who had been admitted to the

Defendant Hospital under DR. DAM's care. This committee consisted of Dr. Donald A. Brungard, Dr. Dale F. Syfert, Dr. DiLorenzo, and Mr. David Kribs, Hospital Administrator was in attendance.

6. Chart #20184 reflected the records of an obstetrical patient admitted by DR. DAM, hereinafter called Mother, and Chart #20184NB, reflected the records of her male infant, hereinafter referred to as Baby.

7. On July 28, 1977, the Clinical Review Committee met and reviewed these two charts at the suggestion of Dr. Dale F. Syfert that there had been "possible mismanagement" of these patients by DR. DAM. Based on the information contained in the charts, and information provided by Dr. Dale F. Syfert to the Committee, a formal recommendation was made that DR. DAM's future treatment of newborn infants be monitored by another staff physician for a period of one year. Further, at the end of the one year period, a necessity or appropriateness of such observation would be reviewed by the Clinical Review Committee and the Executive Committee. It was understood by members of the Committee at that time that such a restriction would be a mandatory prerequisite to DR. DAM's admission or treatment of any newborn child and by practical effect, would be a mandatory prerequisite to the admission of any obstetrical patient whose child he intended to care for after its delivery.

8. This action was reduced to written form in the official minutes of the Clinical Review Committee meeting of June 28, 1977, by Mr. David Kribs.

9. The minutes reflected that the Clinical Review Committee had made a unanimous decision that such a recommendation was necessary under the circumstances and that the matter was being forwarded to the Executive Committee for its approval and/or implementation of the privilege restriction described above.

10. On July 1, 1977, the Executive Committee met for the purpose of reviewing the charts of the Mother and Baby and the recommendation of the Clinical Review Committee that DR. DAM be restricted in the manner described above.

11. At that time, Dr. Dale F. Syfert presented the charts referred to above, and based on the information contained in the minutes of the Clinical Review Committee meeting of June 28, 1977, the charts of the Mother and the Baby, and the information provided by Dr. Syfert, the Committee voted to implement the restriction described above and to so inform DR. DAM by letter.

12. Mr. David A. Kribs, drafted a letter, dated July 8, 1977, which was signed by Dr. Robert E. Lee, and mailed to DR. DAM. A copy of this letter is attached as Plaintiff's Exhibit A.

13. In this letter, the Defendant Hospital informed the Plaintiff that his treatment of Newborn Infant #20184NB was not in keeping with good medical practice. Further, it informed him that it was the decision of the Executive Committee that for a period of one year, a physician or physicians will be assigned to observe the care which DR. DAM would render to all infants in the newborn nursery. It further informed DR. DAM at the end of a one year period of time the appropriateness and/or necessity of this observation will be reviewed by the Clinical Committee and the Executive Committee.

14. The letter notifying DR. DAM of the reduction of his admitting privileges, except as performed in compliance with the restriction above, further informed him that he could appeal this action through the appeals mechanism found in the hospital by-laws. Accompanying the letter was a document called Addendum to the By-laws and Rules and Regulations of the Medical Staff, date of adoption, 4/15/75, attached as Plaintiff's Exhibit B.

15. On July 12, 1977, DR. DAM received the letter described above containing the selected portions of the by-laws described above. On or before July 18, 1977, DR. DAM complied with the procedures described in subsection A(c)(2), of the attached by-laws.

16. On or about July 14, DR. DAM made an oral request for a hearing to review the above described action of the Executive Committee to Dr. Robert E. Lee.

17. DR. DAM made a second request for a hearing by sending Dr. Robert E. Lee a written request on or before July 18, 1977, which request was received by Dr. Lee's agent, Cindy Lee on or about July 19, 1977.

18. The Defendant Hospital failed to respond either officially or unofficially to Dr. Dam's request for a hearing. As a result therefore, he was injured in the manner specifically described in Counts I through V of this Complaint.

COUNT I

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

19. The Plaintiff readopts the allegations contained in Paragraphs one through eighteen above, and further alleges:

20. That the Defendant Hospital, acting through its agents, intentionally and maliciously, and/or recklessly acted to cause severe emotional distress to the Plaintiff by falsely accusing him of treatment of a newborn child which was not in keeping with good medical practice and by refusing to allow him the opportunity to defend himself against this accusation and by enacting a restriction upon his admitting privileges which they knew or should have known would result in the elimination of a substantial part of his medical practice in Haines City, Florida. This severe infliction of emo-

tional distress was accomplished in the following specific manner:

21. Before the Clinical Review Committee meeting of June 28, 1977, it came to the attention of the Chief of Staff, Dr. Robert E. Lee, that Dr. Dale F. Syfert was reviewing DR. DAM's charts, and conducted what amounted to a personal and private monitoring of DR. DAM's patient care. A review of a fellow physician's charts when not conducted as part of an official function is known to be an unethical and improper procedure in the medical community. Dr. Lee spoke to Dr. Syfert about this violation, and asked that it not be repeated in the future.

22. On June 28, 1977, at the meeting of the Clinical Review Committee, Dr. Dale F. Syfert brought the charts of the Mother and Baby to the attention of the Committee. After the presentation of the charts by Dr. Syfert, for possible mismanagement, there were suggestions made by other members of the Committee, including but not limited to Dr. Donald Brungard, that DR. DAM be allowed an opportunity to explain his care of the Mother and Baby. Despite that suggestion by Dr. Brungard, no such opportunity was afforded DR. DAM prior to the vote to recommend the above-described restriction to the Executive Committee.

23. The minutes of the June 28, 1977, Clinical Review committee were compiled by Mr. David A. Kribs and falsely and incorrectly reflected that the privilege

restriction described above was the result of a unanimous decision by the Clinical Review Committee to recommend such restriction on DR. DAM's privileges. Further, they omitted any reference to the objections made by the members of the Committee to the procedure by which the recommendation was adopted, as no opportunity was afforded DR. DAM to defend his medical treatment before such a recommendation was made.

24. Because the specific written minutes described above were presented to the Executive Committee on July 1, and in part form the basis upon which the Executive Committee voted to implement the restriction recommended by the Clinical Review Committee, the omission of this information constituted an act done with the intent to injure DR. DAM, or in the alternative done in reckless disregard of the truth and in reckless disregard of DR. DAM's rights.

25. Before the Executive Committee met on July 1, 1977, Dr. Robert E. Lee was approached personally by Dr. Brungard and informed that Dr. Brungard felt that the proceedings in the Clinical Review Committee meeting of July 27, were "unjust" and that he felt DR. DAM should have had an opportunity to defend his treatment of the Mother and Baby before such a recommendation as that described above should be made.

26. On July 27, 1977, the Executive Committee convened for the purpose of reviewing the above de-

scribed recommendation of the Clinical Review Committee. Present at that meeting were, among others, Dr. Robert E. Lee, Dr. Dale F. Syfert, Dr. Frank J. Thornton, and Mr. David Kribs. At that time and place, the Committee acted with malice, or in reckless disregard of DR. DAM's rights, with the intent to cause him severe emotional distress, by implementing the restriction described above, despite actual knowledge of the following factors:

(a) David Kribs who had been in attendance at the Clinical Review Committee meeting of July 27, 1977, knew that the Committee had not been unanimous in its decision to recommend the actual implementation of the restriction described above, but failed to so inform the Committee or recommend that DR. DAM be allowed to defend his treatment before the implementation of the restriction.

(b) Dr. Dale F. Syfert, who was the person primarily responsible for making the accusation of mismanagement against DR. DAM, knew of the dissatisfaction expressed by members of the Clinical Review Committee meeting at which the recommendation was made, but failed to recommend that DR. DAM be given a chance to defend his treatment of the patients concerned.

(c) Dr. Robert E. Lee knew, personally, of Dr. Brungard's concern with the manner in which the Clinical Review Committee's review had occurred and Dr.

Brungard's desire that further investigation should be conducted before any formal restriction upon DR. DAM's privileges was imposed.

(d) Dr. Robert E. Lee, Dr. Dale F. Syfert, Mr. David E. Kribs and Dr. Frank J. Thornton, each knew or should have known that formally accusing DR. DAM of medical treatment "not in keeping with good medical practice" would cause him severe emotional distress.

(e) Further, each person previously named, knew or should have known that upon the imposition of such a restriction, DR. DAM would discontinue, as soon as practicable, the admission of obstetrical/new born patients to the Heart of Florida Hospital rather than submit to a monitoring of his patient's care by another physician, which practice could, if known to the patient cause the patient to question DR. DAM's professional competence.

(f) Further, Dr. Lee knew that Dr. Syfert had conducted an unauthorized review of DR. DAM's charts before the matter of the care of #20184 and #20184NB came under review by the Clinical Review Committee.

27. Despite this knowledge, Dr. Robert E. Lee acting on the basis of the formal decision of the Executive Committee, and as Chief of Staff and agent of the Defendant Hospital, with the intent to cause severe

emotional distress to the Plaintiff, or in the alternative with reckless disregard for the fact that such severe emotional distress would occur, wrote the Plaintiff the letter attached as Exhibit A and informed him of the formal implementation of the restriction described above.

28. Following DR. DAM's receipt of Exhibit A, on July 12, 1977, Dr. Lee was again approached by Dr. Brungard, who expressed concern that DR. DAM had been formally censured without having had the opportunity to defend himself. Dr. Lee was informed that DR. DAM was emotionally distressed and upset at the decision and that DR. DAM wanted an opportunity to defend the medical treatment upon which the censure was based.

29. Further, on or about July 14, 1977, DR. DAM personally requested that Dr. Lee give him a hearing in which the decision of the Executive Committee could be reviewed or questioned.

30. On or about July 18, 1977, DR. DAM made a formal request, by letter, to Dr. Lee, in compliance with the by-laws of the Defendant Hospital in which a hearing was again requested.

31. At that time, Dr. Lee knew or should have known that DR. DAM believed, upon receipt of the letter marked Plaintiff's Exhibit A, that he was accused of "medical treatment not in keeping with the stand-

ards of medical care at the Heart of Florida Hospital" and this allegation caused DR. DAM severe emotional and mental distress.

32. Further, Dr. Lee knew or should have known, that DR. DAM believed that the medical treatment rendered his future newborn patients would be monitored by another physician on staff and that such a practice would cause great emotional and mental distress to DR. DAM.

33. Further, Dr. Lee knew or should have known that DR. DAM would discontinue, as soon as practicable, the admission of obstetrical patients to the Heart of Florida Hospital rather than submit to the monitoring practice described above, which if known to the patient could cause the patient to question DR. DAM's professional competence.

34. Further, Dr. Lee was advised by the Hospital Attorney, Andrew Reilly, that DR. DAM should be given a hearing and an opportunity to defend his treatment.

35. David A. Kribs was also aware of the advice by the Hospital Attorney that DR. DAM should be given a hearing and an opportunity to defend his treatment.

36. Further, all members of the Executive Committee including Dr. Frank J. Thornton and Dr. Dale F.

Syfert, were advised of the Hospital Attorney's recommendation that DR. DAM be given a hearing and an opportunity to defend his treatment.

37. David A. Kribs, Robert E. Lee, Frank J. Thornton and Dale F. Syfert, all knew or should have known that DR. DAM believed himself to be restricted from the admission of newborn patients unless he would submit to the monitoring of the care of such patients by another staff physician. All of these people knew or should have known that DR. DAM felt himself to be falsely accused of employing medical treatment "not in keeping with good medical practice" and that he wished the opportunity to defend himself and clear his record of this accusation. Further, all of these people knew or should have known that DR. DAM would cease to admit obstetrical patients, as soon as practical, rather than submit to the monitoring practice described above.

38. Despite the knowledge of the extreme mental distress suffered by DR. DAM and the probable effects upon his practice of the restriction described above, the Defendant Hospital acting through its agent, refused to honor DR. DAM's request for a hearing, and they did so with the knowledge that the refusal to allow DR. DAM to defend his treatment of the newborn baby would cause severe emotional distress to DR. DAM and affect his medical practice at the Defendant Hospital in the manner described above.

39. Further, the letter attached as Plaintiff's Exhibit A was made a permanent part of DR. DAM's personnel file at the Defendant Hospital and is contained in his file at the present time. The Defendant Hospital knew or should have known that the placement of this letter in DR. DAM's file, which was done with the intent to cause him severe mental distress, or in the alternative, in reckless disregard of the fact that it would cause him severe mental distress, would so affect the Plaintiff.

40. As a result of the above-described acts or omissions DR. DAM was damaged in his professional reputation, suffered humiliation and embarrassment, and suffered severe mental anguish and severe mental distress. Further, DR. DAM discontinued undertaking the care of obstetrical patients, as he believed he would not be allowed to care for their newborn infants following delivery at the Heart of Florida Hospital without being monitored by a staff physician. In light of the procedure described above and his inability to defend his treatment which resulted in the restriction described above, he feared that future incidences or censures would occur as a result of the monitoring practices described above. Further, he feared that his obstetrical patients would learn that his care of their newborn children would be under observation because of his "mismanagement of a newborn child" and that such knowledge, if known by the patient, could cause the patient to lose confidence in DR. DAM as a physician.

Therefore, DR. DAM lost contracts with potential obstetrical patients and lost income from potential obstetrical patients as a result of the specific acts and omissions described above which were performed with the intent to accomplish such a loss to DR. DAM or in the alternative, were reasonably calculated to cause such a loss of patients to DR. DAM.

WHEREFORE, the Plaintiff requests trial by jury and demands compensatory and punitive damages in excess of One Hundred Thousand ($100,000.00) Dollars.

COUNT II

TORTIOUS INTERFERENCE WITH BUSINESS CONTRACTS

41. The Plaintiff realleges and adopts paragraphs one through forty and further alleges that:

42. The Defendant Hospital acting through its agent as described above intentionally interfered with DR. DAM's business relationship with future obstetrical patients and caused a loss of the potential contracts for treatment of these patients in the following specific manner:

43. The Defendant Hospital knew or should have known that the Plaintiff relied upon contracts with obstetrical patients to provide a part of his income as a medical practitioner.

44. The Defendant Hospital knew or should have known that DR. DAM did not have staff privileges at any other hospital facility in the area, and knew or should have known that any restriction on his right to admit obstetrical patients to the Defendant Hospital would cause a reduction in his income from that source.

45. The Defendant Hospital knew or should have known that a restriction placed on the manner in which a newborn child could be treated at the Defendant Hospital nursery, would in effect restrict the admission of obstetrical patients as it was the common medical practice in the Defendant Hospital's community for the doctor who delivered the obstetrical patient to care for the newborn child that resulted from that delivery.

46. The Defendant Hospital knew or should have known that the Plaintiff was aware that his charts were being reviewed on the hospital floor, contrary to the standard medical custom at the Defendant Hospital, and that he had been accused of mismanagement of a newborn child's care without being given the opportunity to defend himself at anytime despite the procedural safeguards embodied in the Hospital by-laws; that future admissions of newborn children would be monitored in a similar fashion in accordance with the Executive Committee's decision of July 1, 1977.

47. The Defendant Hospital knew or should have known that in light of those circumstances, the Plaintiff would be likely to discontinue the care of obstet-

rical patients rather than submit to the monitoring procedure which had severe effects on his professional status as well as his relationship with his obstetrical patients. Specifically, DR. DAM feared that his patients would lose confidence in his ability if they were to become aware that the Defendant Hospital had ordered his care of all newborn treatment to be supervised by another staff physician. Additionally, DR. DAM feared that a continued review procedure, to which he would not be able to respond should future accusations of mismanagement be made, could result in his elimination as a member of the Hospital staff.

48. The Plaintiff delivered only the obstetrical patients to whom he had been committed during their pregnancies, at the time he was informed of the Executive Committee's decision of July 1, 1977. He did not accept any new obstetrical patients from the time the decision was announced until the present date and has lost and will continue to lose profits from the potential contracts that he was forced to refuse.

49. Further, DR. DAM suffered mental anguish, severe mental distress, past and future loss of income as a result of the above described interference with his practice of his medical profession.

50. The above described acts were done intentionally, with the intent to injure DR. DAM as described above or in the alternative were done with reckless disregard of the injury that such acts would produce.

WHEREFORE, the Plaintiff requests a trial by jury and demands compensatory and punitive damages in excess of One Hundred Thousand ($100,000.00) Dollars.

COUNT III

51. The Plaintiff realleges paragraphs one through fifty and further alleges:

52. Dr. Dam was denied fundamental due process rights under Article I, Declaration of Rights, Section 9, Florida Constitution (1968), as the Defendant Hospital substantially departed from the provisions of its by-laws in reducing his admitting privileges. These due process departures from the by-laws of the Defendant Hospital include, but are not limited to, the following:

(a) the letter informing DR. DAM of his reduction of Staff privileges did not adequately advise DR. DAM of his right to a hearing before an ad hoc hearing committee of the medical staff as required by the by-laws.

(b) The letter informing DR. DAM of his reduction of staff privileges did not advise DR. DAM of his right to appellate review by the governing body of the Defendant Hospital if the recommendation of the Executive Committee following the ad hoc hearing was still adverse as required by the by-laws.

(c) The letter informing DR. DAM of his reduction of staff privileges did not specify that DR. DAM had seven days following the date of receipt of the letter within which to request a hearing or appellate review as required by the by-laws.

(d) The letter informing DR. DAM of his reduction of staff privileges did not state that if DR. DAM failed to request a hearing or an appellate review within seven days, he waived his right to such hearing or appellate review, as required by the by-laws.

(e) The letter informing DR. DAM of his reduction of staff privileges did not inform DR. DAM that once his request for hearing had been received, he would be notified of the date, time and place for the hearing or appellate review and the grounds upon which the adverse action of the Executive Committee was based, as required by the by-laws.

(f) The letter informing DR. DAM of his reduction of staff privileges did not advise DR. DAM of his right to review the hearing record and report of the Clinical Review Committee and the Executive Committee, and to submit a written statement in his behalf, as required by the by-laws.

(g) The letter informing DR. DAM of his reduction of staff privileges was not sent by the Administration of the hospital, as required by the by-laws.

(h) Even though DR. DAM requested a hearing on at least two occasions, he was not notified by the Executive Committee nor governing body of the Defendant Hospital, within three (3) days after receipt of his request for a hearing, of the time, place and date of such a hearing, by certified mail, return receipt requested, as required by the by-laws.

(i) Even though DR. DAM requested a hearing on at least two occasions, he has never been granted one, even though a hearing is required by the by-laws.

(j) DR. DAM has not been allowed to review and examine the original chart of newborn #20184NB, as required by the by-laws.

(k) DR. DAM has not been allowed to review the hearing record, the minutes and report of the Clinical Review Committee, as required by the by-laws.

(l) DR. DAM has not been informed of the specific omissions, commissions or deviations from good medical practice which formed the basis of the decision of the Clinical Review Committee to reduce his staff privileges as required by the by-laws.

(m) DR. DAM has not been allowed, by the Clinical Review Committee or the Executive Committee to appear with counsel, to testify or call witnesses, to introduce oral or written evidence, and to refute any

and all charges or accusations against him, as required by the by-laws.

(n) DR. DAM has not been informed by the Clinical Review Committee nor the Executive Committee, nor the governing body of the Defendant Hospital of a final decision concerning the reduction of his staff privileges as required by the by-laws.

53. Because of the restriction placed on his privileges and the action taken by the Defendant, DR. DAM has suffered damage to his professional reputation. He has not had an opportunity to refute the allegations made against him. He has not been informed if the restrictions on his privileges have been withdrawn following the passing of the one year period. The letter described above is in DR. DAM's personnel file at the hospital. This letter is subject to review by anyone inspecting his file. By its very terms, such a letter will have a continuing effect on DR. DAM's professional reputation, his ability to procure medical malpractice insurance, and his relationship with his patients.

WHEREFORE, the Plaintiff requests a final judgment to be entered by this Court perpetually requiring the Defendant, HEART OF FLORIDA HOSPITAL ASSOCIATION, INC., to:

(a) Reinstate DR. DAM's full medical privileges unless and until he is given hearing and the other due

process guaranties provided by the by-laws of the Defendant.

(b) Remove from his personnel file any reference to this entire incident until he is given a hearing and the other due process guaranties provided by the by-laws of the Defendant.

54. As a result of the above described due process departures from the by-laws and as a result of his restricted staff privileges, DR. DAM was damaged in his reputation, suffered humiliation and embarrassment, suffered mental distress, loss of contracts and earnings from his patients, loss of prospective contracts with new patients and lost income in the past and he will lose income in the future.

WHEREFORE, the Plaintiff requests trial by jury and demands punitive and compensatory damages in excess of One Hundred Thousand ($100,000.00) Dollars.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to: JAMES A. MURMAN, ESQ., Post Office Box 1628, Tampa, Florida 33601; to ANDREW R. REILLY, ESQ., Post Office Box 2039, Haines City, Florida 33844; and to, G. BRUCE HILL, ESQ., 1200 Hartford Building, 200 East Robinson St., Orlando, Florida 32801, on this 4th day of September, 1979, by U.S. mail.

BLACKBURN, GIBSON & GULDEN
512 East Washington Street
Orlando, Florida 32801
305/425-0111
Attorneys for Plaintiff

/s/ ELIZABETH J. GULDEN
ELIZABETH J. GULDEN

IN THE CIRCUIT COURT OF THE
TENTH JUDICIAL CIRCUIT
IN AND FOR POLK COUNTY, FLORIDA

MICHAEL E. DAM, JR., M.D.,
Plaintiff,
Case No.
versus GCG-79-1533

HEART OF FLORIDA HOSPITAL
ASSOCIATION, INC.,
Defendant.

FINAL JUDGMENT

Pursuant to the Verdict rendered in this action,

It is adjudged that the Plaintiff, MICHAEL E. DAM, JR., M.D., recover from the Defendant, HEART OF

FLORIDA HOSPITAL ASSOCIATION, INC., the sum of $65,000.00, together with costs in the sum of $2,577.83, for which let execution issue.

As to the portion of the action asking for equitable relief which was tried before the Court, on the evidence presented,

It is adjudged that the HEART OF FLORIDA HOSPITAL ASSOCIATION, INC., is required to:

(a) Reinstate Dr. Dam's prior medical privileges unless and until he is given a hearing and other due process guaranties provided by the laws of the Defendant.

(b) Remove from his personnel file any reference to this entire incident until he is given a hearing and the other due process guaranties provided by the by-laws of the Defendant.

ORDERED at Bartow, Florida, on this 7th day of July, 1980.

/s/ E. RANDOLPH BENTLEY
CIRCUIT JUDGE

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Judgment has been furnished to MICHAEL TONELLI, ESQ./JAMES A. MURMAN,

ESQ., Post Office Box 2762, Tampa, Florida 33601; to ANDREW R. REILLY, ESQ., Post Office Box 2039, Haines City, Florida 33844; to G. BRUCE HILL, ESQ., 1200 Hartford Building, 200 East Robinson Street, Orlando, Florida 32801; and, to DONALD L. GIBSON, ESQ./ELIZABETH J. GULDEN, ESQ., 512 East Washington Street, Orlando, Florida 32801, on this ____day of June, 1980.

_____

SECRETARY TO THE JUDGE

Supreme Court, U. S.
FILED
NOV 17 1980
MICHAEL RODAK, JR., CLERK

No. 80-496

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

JAMES C. BURNS; C. H. CARTER; LOUIS J. GIDDENS; DELBERT R. GRANDE; DAVID C. MILLIGAN; THOMAS M. POTTER; JAMES A. RIDDLE; W. R. TODD; JOSEPH O. TURNER, II; KENNETH E. MAGENHEIMER; JACK CLINE; and ROLAND L. LANCASTER,

Petitioners,

versus

GULF OIL CORPORATION,
a foreign corporation,

Respondent.

On Writ of Certiorari to
The United States Court of Appeals
For the Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

BENJAMIN H. HILL, III
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Attorneys of Record

QUESTION PRESENTED FOR REVIEW

WHETHER THE COURT OF APPEALS CORRECTLY AFFIRMED A SUMMARY JUDGMENT IN FAVOR OF AN EMPLOYER, AND AGAINST EMPLOYEES WORKING UNDER A CONTRACT FOR AN INDEFINITE TERM TERMINABLE AT WILL, WHO WERE DISCHARGED BY THEIR EMPLOYER FOR THE ADMITTED THEFT OF COMPANY PROPERTY?

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STATEMENT OF THE CASE

This Petition for Writ of Certiorari arises from a *per curiam* affirmance by the United States Court of Appeals for the Fifth Circuit of a summary judgment granted in favor of Respondent, Gulf Oil Corporation ("Gulf"), in an action brought by Petitioners, twelve of its former employees who were employed as truckdrivers at Port Tampa, Florida. Each of the twelve was discharged in 1975 for taking gasoline from Gulf's Port Tampa facility. It is undisputed that each of the twelve Petitioners in fact took gasoline belonging to Gulf without payment; in fact, each Petitioner admitted having done so in his deposition.

The employment agreements between each of the twelve Petitioners and Gulf were on their face terminable at will by either Gulf or the employee. The contracts were of two basic types, one providing in pertinent part that "The employment of the Employee hereunder may be terminated by either party at any time," and the other providing that "Notwithstanding the rate of compensation above mentioned, the GULF OIL CORPORATION has the right to discharge said employee at any time . . .". Despite the clear language of these contracts, Petitioners filed suit against Gulf alleging, among other things, that their discharge constituted a breach of the employment agreements. Their complaint, as ultimately amended, attempted to convert their employment by Gulf into something more than a common law employment terminable at will by alleging that agents of Gulf had stated that following a six-month probationary period they would have a lifetime job with Gulf, and that employee benefits such as retirement plans, life insurance and the like, created a proprietary interest in their jobs which entitled them to be discharged only for

cause. After the initial complaint was twice dismissed and amended, Gulf moved for summary judgment on this breach of contract count, contending that under Florida law, it was entitled to discharge the Petitioners with or without cause, and that this right was not lost by the fact it provided employee benefits or by the alleged oral promises of a lifetime job. This motion was granted by the District Court.

At the time summary judgment was granted on the breach of contract claim, the complaint contained an additional count seeking recovery against Gulf for slander and the tort of "outrage" (intentional infliction of mental distress). Because of the combination of two causes of action in a single count, the court directed the filing of a third amended complaint setting forth the causes of action in separate counts. Petitioners utilized this opportunity to file a complaint which merely incorporated the bulk of the allegations previously made under the breach of contract count. Upon Gulf's motion, the District Court again dismissed Petitioners' complaint and instructed them not to file another cause of action under any title on issues previously ruled upon.

The same scenario was repeated in the fourth amended complaint, prompting the District Court to grant Gulf's motion to dismiss in a three-page order which outlined the history of the litigation to date and clearly indicated that the court was of the view that the fourth amended complaint violated the letter and spirit of the court's prior orders. The order advised the Petitioners that, because of the prior summary judgment ruling, they could not allege the unlawfulness of their termination or their loss of their rights to continued employment benefits, but could assert a claim for damages if they alleged that the manner and

method in which the termination was effected by Gulf amounted to extreme or outrageous conduct. The court directed the Petitioners to file a fifth amended complaint within two days of the date of the order and stated that Petitioners' "failure to comply with this final order will result in either the dismissal of the outrage count or *sua sponte* action pursuant to Rule 12(f) Fed.R.Civ.P." Gulf was also directed to answer the fifth amended complaint within two days of its filing.

A fifth amended complaint was filed and Gulf again moved to dismiss on the grounds that it was subject to the same defect noted in the court's prior orders. This time the court denied the motion to dismiss, but in its order indicated that it would "scrupuously [sic] supervise the introduction of evidence related to the elements of the tort."

Because the Petitioners' prior actions indicated an intent to try this suit on the issue of wrongful discharge regardless of the theories denominated in its complaint, Gulf immediately prior to trial filed a motion *in limine*. This motion sought to preclude the Petitioners, without first requesting the permission of the court outside of the hearing of the jury, from introducing any evidence on the following issues: (1) that other employees of Port Tampa Terminal of Gulf had taken products for their own personal use; (2) that employees of Gulf, other than employees of the Port Tampa Terminal, had ever been involved in any criminal or illegal activity or violated any company policy of Gulf with respect to taking products for personal use; and (3) that Petitioners were discharged for allegedly attempting to organize the union, to reduce the number of truckdrivers at the Port Tampa Terminal, for the purpose of shifting to independent gasoline haulers, or other "reasons" (as opposed to manner and method) of the Petitioners' discharge. Gulf sought the

in limine ruling to avoid having to object to immaterial and prejudicial matter, thus further implanting these facts in the minds of the jury, or alternatively not objecting and allowing the evidence to be considered.

This motion was considered in an in-chambers conference on the morning of trial. Interestingly, prior to the presentation and consideration of the motion, the District Court indicated its own intention to similarly limit the evidence. Following argument of counsel, the court granted the motion *in limine,* following which jury selection resumed. At 1:00 p.m. that afternoon, Petitioners requested an in-chambers conference with the District Judge. At that time they announced that, in light of the court's ruling on the motion *in limine,* they would join in a renewed motion by Gulf for summary judgment on the remaining counts of slander and outrage. In light of the fact that a jury had already been selected, the court indicated its unwillingness to grant summary judgment, even though the Petitioners had joined in the motion, if there was any contention that genuine issues of material fact remained to be tried. Petitioners' counsel accordingly stated on the record that, absent the evidence the court announced it had intended to exclude, there were no disputed issues of material fact and Gulf was entitled to judgment as a matter of law. Significantly, the District Court, in response to a comment by Petitioners' counsel that the court's ruling on the motion *in limine* had caught him completely by surprise, questioned Petitioners' counsel as to whether he would contend on appeal that he was deprived of his right to get ready for trial, to which Petitioners' counsel responded in the negative. Following the conference, the court entered an order granting final summary judgment, and a final judgment on the Petitioners' complaint.

Petitioners subsequently filed a motion for rehearing, in which they contended that the hearing of the motion *in limine* on short notice violated Rule 6(d) and 7(b) of the Federal Rules of Civil Procedure, and further sought disqualification of the District Judge on the grounds of bias and prejudice. The District Court denied the motion for rehearing. As to the request for recusal, it noted that it was neither sufficient in form to comply with 28 U.S.C. §144, nor sufficient in substance to require recusal even if the form had been proper (the motion alleged no bias arising from extrajudicial sources, but merely that the Petitioners considered the District Court's rulings unfair). As to the motion *in limine,* the court noted that the Petitioners in fact had actual notice of the points raised in the motion in time to prepare to meet them because the motion *in limine* merely reiterated and applied the court's earlier ruling on the same issues. Moreover, it noted that the Petitioners had in any event not been prejudiced by the ruling, because they were in exactly the same position as if the motion had not been filed, the evidence proffered at trial, and excluded upon objection.

Following the denial of their motion for rehearing, the Petitioners noticed an appeal to the United States Court of Appeals for the Fifth Circuit. Following briefing and argument, the Court of Appeals on June 4, 1980, issued a brief *per curiam* opinion affirming the judgment of the District Court in all respects. The opinion concluded there was no merit to the contract claim because the employment agreements were for an indefinite term and therefore terminable at will by either party under Florida law. The Court of Appeals similarly rejected the claim that the Petitioners should be permitted to maintain the action because of allegations they were fired for union organizational activities;

as the court noted, any such claim should first have been filed with the National Labor Relations Board. Finally, the Court of Appeals concluded that the Petitioners had not been prejudiced by the granting of a motion *in limine* on the morning of trial since they had not objected and had actual prior notice, and that an eleventh hour effort to disqualify the District Judge was on its face fatally defective under 28 U.S.C. §144.

Following the denial of Petitioners' motion for rehearing on July 2, 1980, this Petition for Writ of Certiorari was taken.

ARGUMENT

While Respondent Gulf finds the Petitioners' argument in support of its Petition for Writ of Certiorari in many ways confusing and hard to follow, it is clear that the gravamen of the argument is again to attempt to establish a basis upon which to contest the discharge of Petitioners, twelve truck drivers formerly employed by Gulf at its Port Tampa, Florida, plant, who were employed by Gulf under contracts of employment of indefinite duration terminable at the will of either party, and who were discharged by Gulf for the theft of company products. Each of the twelve discharged employees admitted on deposition in this action that they in fact had taken Gulf products for their personal use without permission or authorization.

Before the District Court and the Court of Appeals, Petitioners sought to establish a basis to attack their discharges by asserting that other aspects of the employment relationship between themselves and Gulf had converted the employment at will into something more. For example, they contended that the numerous fringe benefits offered by Gulf, Gulf's personnel policies, and even the obligation

of Petitioners, who were employed as truck drivers, not to disclose Gulf's trade secrets had the effect of giving the Petitioners vested rights in their jobs. Unfortunately for the Petitioners, there was clear law holding that such factors did not convert a common law employment terminable at will into vested employment rights and the District Court granted partial summary judgment on this contract claim.[1] The Court of Appeals affirmed this conclusion of the District Court, observing:

> There is no merit to the contract claim. The employment contracts were for an indefinite term and were terminable at will by either party. Thus, under Florida law Gulf had the right to fire the employees for any reason or even for no reason. *See Harrison v. Jack Eckerd Corporation,* 342 F.Supp. 348, (M.D. Fla), *aff'd,* 468 F.2d 951 (5th Cir. 1972). However, Gulf clearly had good cause — theft of company property, a major offense under the company rules. The plaintiffs' participation in employee benefit plans, such as retirement program and stock option plan, did not change the contract terms or give them a vested property interest in their jobs. *Id. Burns v. Gulf Oil Corp.,* 78-3263 (5th Cir. 1980) (unpublished slip op. at 2).

Implicitly recognizing that their contract claim was indeed without merit, Petitioners have based their Petition

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[1] In fact, this case terminated at the trial level when the Petitioners joined in Gulf's Motion for Summary Judgment as to the remaining counts of their Complaint after the District Court granted a Motion in Limine indicating that it was not going to permit the Petitioners to retry the breach of contract claim, on which it had already granted summary judgment, under the guise of the torts of slander and outrage.

for Writ of Certiorari upon an attempted revivification of allegations dismissed with prejudice by the District Court early in the litigation, and not argued before the Court of Appeals,[2] to the effect that these discharges, even under a common law employment terminable at will, violated the Petitioners' Constitutional rights to due process and equal protection and also portions of the civil rights laws, specifically 42 USC §1983 and §1985.

The basis of the alleged due process, equal protection and civil rights violations claimed in the petition is the assertion that, in discharging the Petitioners, Gulf "discriminated" against them because it failed to similarly discharge other individuals whom these individuals accused of having also stolen company products. Initially, it should be noted that the factual basis for this claim of "discrimination" is simply frivolous. It is undisputed that each of the twelve Petitioners discharged by Gulf in fact were guilty

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[2] Gulf would respectfully submit that the fact that the Petitioners rely almost exclusively on arguments not raised before the Court of Appeals is itself dispositive of the appropriateness of certiorari. As Rule 17 of this Court's rules points out, and the Petitioners' jurisdictional statement acknowledges, the considerations relevant to a grant of certiorari in this cause are whether the Court of Appeals' decision conflicts with decisions of other federal courts on the same matter or otherwise has so far departed from the accepted and usual course of judicial proceedings that it calls for an exercise of this Court's power of supervision. An assertion that the Court of Appeals reached an incorrect result because of its failure to consider arguments not presented to it, of course, can establish neither ground for certiorari review. Indeed, the only ground argued in this petition which was also raised before the Court of Appeals was a suggestion that Petitioners were discharged because of their union activities. However, the Court of Appeals explicitly described even this as a suggestion "tangentially toss[ed] in" by the Petitioners and, in any event, as the Court of Appeals noted, could not have been a basis upon which to sustain the action because such claims are committed to the exclusive jurisdiction of the National Labor Relations Board.

of the offense of theft of company property; indeed, each admitted the same on his deposition in this action. It is likewise undisputed that each individual who admitted the theft of Gulf property was discharged. The gravamen of Petitioners' charge of discrimination is that Gulf refused to discharge certain other individuals whom those employees who admitted the theft also accused of having engaged in the same conduct. Suffice it to say, Petitioners have never cited any authority which would require Gulf to take the Petitioners' unsupported allegations of wrongdoing against others at face value, or which would destroy the discretion to take such disciplinary action as it deemed appropriate.

However, more fundamentally, even if Petitioners' allegations were true, and Gulf had "discriminated" against them by failing to discharge others similarly situated, the short answer is that that does not invest the Petitioners with a cause of action against Gulf unless it can be demonstrated that the purported "discrimination" was on some ground prohibited by public law, such as racial or ethnic discrimination or the like. This, of course, is the precise point of *McDonald v. Santa Fe Trail Transportation Company*, 427 U.S. 273 (1976), cited by the Petitioners in their brief, and the earlier case of *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1973), cited in *McDonald*. As this Court specifically observed in *McDonnell-Douglas*, a former employee's participation in an illegal "stall in" was more than sufficient justification to refuse to rehire him as an employee, subject only to the former employee's right to prove that such illegal conduct was not the actual reason for the refusal to hire, but merely a pretext for prohibited racial discrimination.

Of course, there is no allegation or suggestion that the Petitioners' discharge was the product of any racial or ethnic discrimination. Indeed, the only suggestion made by the Petitioners that Gulf may have considered any factor in deciding to discharge them other than their theft of company property, was the tangential assertion that these Petitioners may have been fired for union organizational activities.[3]

A short answer to this claim, however, is that if the Petitioners really believe they were discharged for union activities, the District Court was not the place to assert such a cause of action and indeed had no jurisdiction to entertain it. Rather, the Petitioners were required to have filed a complaint with the National Labor Relations Board, to whom has been preemptively committed the exclusive jurisdiction of allegations of discharge for pro-union activities. As this Court held in *San Diego Building Trades Council v. Garmon,* 359 U.S. 236 (1959):

> When an activity is arguably subject to §7 [employee rights] or §8 [unfair labor practices] of the Act, the States as well as the Federal Courts must defer to the exclusive competence of the

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[3] Once again, the facts suggest that even this allegation was not seriously made and was indeed an afterthought. Indeed, any suggestion of a union connection to the Petitioners' discharge did not arise until well into the litigation, in the Petitioners' Second Amended Complaint. Moreover, even then it was not suggested that the Petitioners were discharged for union organizational activities. Rather, the Complaint alleged that the true reason for the Petitioners' discharge was not their theft of company products, but rather because Gulf wished to accomplish a reduction in force in its Port Tampa facility, in itself a legitimate reason for terminating employees. The Complaint then went on to allege that the Petitioners were selected to accomplish this reduction in force because of prior union activities.

> National Labor Relations Board if the danger of State interference with National Labor policy is to be averted.

For these reasons, there can be no equal protection claim arising from the Petitioners' discharge, since it is undisputed that the discharge was not motivated by any ground forbidden by public law. The absence of an equal protection violation, of course, also serves to dispose of the Petitioners' claim under 42 U.S.C. §1985, since it is settled that an unlawful conspiracy under this section must also emanate from racial bias or some other class-based discrimination. *Griffin v. Breckenridge,* 403 U.S. 88 (1971); *McLellan v. Mississippi Power and Light Company,* 545 F. 2d 919 (5th Cir. 1977) (*en banc*).

On the other hand, Petitioners' due process and 42 U.S.C. §1983 claims fail for the simple reason that they are simply not applicable to disputes between private persons such as Gulf and the Petitioners. Clearly, Gulf did not act "under color of state law" in exercising its common law rights to discharge employees terminable at will, and it is likewise settled that the due process clause does not apply to private persons. *Hines v. Cenla Community Action Committee, Inc.,* 474 F. 2d 1052 (5th Cir. 1973); *Northside Motors of Florida, Inc. v. Brinkley,* 282 So. 2d 617 (Fla. 1973). Thus, notwithstanding the Petitioners' assertion that there is "no substantive difference" between a public or private employer insofar as the protection of an employee's fundamental rights are concerned, Gulf would respectfully submit the well-settled law establishes that there is indeed a substantive difference between public and private employers with respect to the applicability of constitutional and statutory provisions designed to limit gov-

ernmental action or action taken under the color and protection of state laws.

CONCLUSION

For the reasons stated, it is respectfully submitted that there is no basis whatsoever for the exercise of this Court's certiorari jurisdiction in this cause. Initially, there is no basis for the exercise of jurisdiction for the simple reason that the Petition is based almost exclusively on arguments not even presented to the Court of Appeals, and accordingly, arguments which cannot present an opportunity for this Court either to correct an error by the Court of Appeals or to exercise its supervisory functions over that court. Additionally, there is no basis for certiorari jurisdiction for the simple reason that the arguments advanced in the petition are totally without merit, and are based on fundamental misunderstandings of the applicability and purposes of the due process and equal protection clauses and the civil rights laws. Accordingly, it is respectfully requested that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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(813) 273-5000
Attorneys for Respondent,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the foregoing have been furnished, by U.S. Mail, this day of December, 1980, to Britt Whitaker, Esquire, 501 E. Jackson Street, Suite 200, Tampa, Florida 33602.

_____

Attorney